



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Butler, Holland and Scales

File: B-234985

Date: July 28, 1989

DIGEST

1. A compelling reason exists for the cancellation of an invitation for bids after bid opening where the contracting agency determines that the solicitation specifications, in essence, for legal services did not properly or adequately describe its actual minimum needs for the legal services required.
2. The failure of solicitation specifications to adequately reflect the agency's minimum needs may not be remedied by a post-award changes to the specifications which affect the nature of the contract.

DECISION

Butler, Holland and Scales (now, Holland and Scales), a law firm in Seattle, Washington, protests the post-bid opening cancellation of invitation for bids (IFB) No. 9-006, issued by the Bureau of Indian Affairs, Department of the Interior, for legal representation of Native Alaskans. Butler, Holland and Scales contends that the agency's cancellation of the IFB was improper and unfair because the solicitation specifications were not inadequate, but provided information sufficiently specific for bidders to respond to its requirements.

We deny the protest.

According to the record, since 1979, the Bureau of Indian Affairs (BIA) has contracted annually for legal services to assist Alaska Indians, Eskimos, and Aleuts in their efforts to perfect legal title, under legislative authorization, to certain land allotments which they claimed based on their asserted occupancy and use of the land over a period of years but which is now patented to the State of Alaska by the Bureau of Land Management. The legal assistance contracts awarded since 1979 called for litigation support

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services (litigation assistance), for which the contractor was paid under "litigation support" contracts. However, the agency indicates that the required legal assistance also included actual client representation before courts and administrative bodies.

According to the BIA's contracting officer, the prior contractor "independently and outside the scope of its Bureau contract . . . won a suit involving a Native allottee and requested reimbursement from the Department of Justice under the Equal Access to Justice Act [28 U.S.C. § 2412(d)]." Although the claim ultimately was paid by the Department of the Interior's Solicitor's Office, the incident did cause the legal services contract to "come under scrutiny," particularly with respect to whether an "attorney fee" or "litigation support" contract was more appropriate.^{1/} It was subsequently determined that, in light of the nature of the services to be performed, the agency should issue an "attorney fee" contract as opposed to a litigation support contract for this service and have litigation support otherwise performed.

The solicitation which is the subject of this protest was issued by the BIA's Juneau Area Office for the provision for "Legal Services to Assist Native Allotment Applicants Court Cases, Administrative hearings, and Adjudicative Processes" with the intent of initiating this new policy. Butler, Holland and Scales submitted the lower of two bids received in response to the IFB. When the procurement was reviewed by the headquarters office following bid opening but prior to award of the contract, the determination was made that the specifications as set forth in the IFB were not consistent with the requirements for an attorney fee contract, but were "more properly in the nature of litigation support services." (Emphasis in original.) The agency then canceled the solicitation on the basis that the specifications were inadequate for the actual work that was to be performed, and this protest followed.

^{1/} The BIA's Alaska Liaison Officer explains that "attorney fees" are paid for "the actual legal representation of the Native Allotment applicant in the litigation: pleading cases and cross-examining witnesses; obtaining depositions and affidavits; filing notices, briefs, and motions for requested actions," whereas "litigation support" is used in reference to "fact finding, data gathering, obtaining witness statements, research, and other support work" for [those cases] in litigation . . . or likely to be in those proceedings immediately"

Butler, Holland and Scales contends that the specifications were adequate to advise the bidders of the services required, and that there was no ambiguity or defect in the IFB that required its cancellation. The protester states that even if there were a defect in the solicitation, it was obvious on the face of the IFB and, thus, could have been corrected without prejudice to either of the two bidders. The protester further contends that there is no administrative authority for canceling the solicitation because the IFB "contains no provision for withdrawal of the bid if there is a qualified bidder."

The agency states that the solicitation failed to describe adequately the actual or minimum needs of the agency in that: (1) the specifications failed to inform potential contractors concerning the clientele, and the nature and quantity of cases to be represented; (2) the specifications improperly included work that was to be performed by the government; and (3) the requirement for attorney representation was not stated. The agency canceled the solicitation with the intent of revising the specifications and to possibly reissue it as a request for proposals (RFP) in light of the nature of the services required. In fact, the agency has subsequently done so, incorporating a work statement which differs substantially from the specifications in the canceled IFB. Award under the RFP is not to be made until this protest has been resolved.

It is well established that, because of the potential adverse impact on the competitive bidding system of cancellation of an IFB after bid prices have been exposed, a contracting agency may reject all bids and cancel an IFB after bid opening only if such action is warranted by a compelling reason. Federal Acquisition Regulation § 14.404-1(a)(1) (FAC 84-5); City Wide Press, Inc., B-231469, Aug. 10, 1988, 88-2 CPD ¶ 127. The parties essentially agree that the use of specifications that do not properly or adequately reflect the government's actual minimum needs generally constitutes a compelling reason for the cancellation of an IFB after bid opening. See Snowbird Indus., Inc., B-226980, June 25, 1987, 87-1 CPD ¶ 630. Thus, the issue here is whether the contracting officer reasonably determined that the need to revise the specifications constituted a compelling reason to cancel the solicitation.

Based on our review of the record, most significant in the agency's determination to cancel the solicitation was the necessity of requiring, not primarily general litigation support services as in the past, but attorney fee services for the representation of specific individuals in the litigation of their cases. In this regard, the agency

explains in its report that since 1987, the need of the agency for these services has "evolved increasingly toward" more actual litigation as opposed to assistance and support with essentially procedural matters. In consideration of these circumstances, the agency decided to "contract out" the more technical client representation services, in connection with which it would pay the contractor for attorney fee services in accordance with established criteria, consideration of which is required before such services are properly reimbursed.

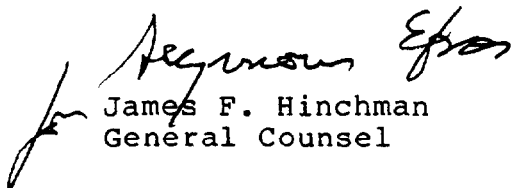
The record supports the agency's statements that despite its intentions to solicit attorney fee services and eliminate most if not all litigation support services from the requirement, the IFB specifications substantially constituted litigation support services as had the contracts issued in previous years. Further, this characterization of the specifications is confirmed by the protester's statements in both its initial submission and its comments on the agency report that the specifications were the same as those under which the legal services were previously performed. These statements constitute a tacit acknowledgment that the solicitation, as initially issued, did not meet what the agency had determined to be the needs of the agency prior to the issuance of the solicitation. The protester's challenge that the cancellation is improper because the solicitation contained no bid withdrawal provision for the low bidder is without merit since no such provision is required to support a contracting officer's discretion to cancel a solicitation based on a compelling reason.

We find, therefore, that based on the record, the agency reasonably determined that a compelling reason existed to cancel the IFB since it did not properly reflect the government's actual minimum needs. Instrument & Controls Serv. Co., B-231934, supra, 88-2 CPD ¶ 345.

We disagree with Butler, Holland and Scales' position that any defect in the IFB was obvious on its face and could have been corrected without its cancellation. The defects went to the nature of the work required and were, thus, not obvious to potential competitors, who had no knowledge of the agency's need to change the contract requirements. Furthermore, the integrity of the competitive procurement

system precludes an agency from awarding a contract under stated specifications with the intent of subsequently making material changes to those specifications. See Donco Indus., Inc., B-230159.2, June 2, 1988, 88-1 CPD ¶ 522.

The protest is denied.


James F. Hinchman
General Counsel